BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROY D. CRAIG	)	
Claimant	)	
	)	
VS.	)	
	)	
VAL ENERGY, INC.	)	
Respondent	)	Docket No. 1,036,182
	)	
AND	)	
	)	
LIBERTY INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 23, 2007 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

ISSUES

The ALJ concluded that claimant's claim was barred by the "going and coming" rule codified at K.S.A. 44-508(f). Thus, he denied claimant's request for benefits. The claimant has appealed this Order alleging that travel is an inherent part of his job and therefore, the "going and coming" exception does not preclude his claim. Respondent contends the ALJ's Order should be affirmed in all respects arguing that at the time of his accident, claimant was traveling to and from a fixed site, rather than a transitory one. Thus, his travel was no more than any other employee and the "going and coming" rule applies.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Order sets out findings of fact that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to

repeat those findings in this order. Therefore, the Appeals Board adopts the ALJ's findings as its own as if specifically set forth herein unless otherwise stated.

Distilled to its essence, the resolution of this case turns upon whether this claimant's claim is barred by the "going and coming" rule or whether the fact that he normally travels to various locations for his job exempt him from that rule under the circumstances of this case. Put another way, if an employee's job normally involves out of town and/or distant travel but at the time of the accident, he is commuting to the respondent's home base of operation, is his claim barred by the "going and coming" rule or does the inherent travel exception carry over even to those instances where the travel is local and not to distant job sites? The ALJ concluded that even though travel was inherent in claimant's job, at the time of his accident he was not traveling to distant worksites. And because of that, he was merely engaged in the normal "going and coming" commute that any employee would be involved in and therefore, his accident was not compensable.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[1] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[2] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[3]

K.S.A. 2006 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2006 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative

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[1] K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[2] K.S.A. 44-501(a).

[3] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[4] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[5]

But K.S.A. 2006 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[6] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[7] Yet another is when the claimant is on a special work-related errand for the employer.[8]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[9] It is this exception that is at the heart of this claim.

In *Messenger*, the claimant was killed in a truck accident "on the way home from a distant drill site" and the court was asked to decide whether claimant's claim was compensable or barred by the going and coming rule. The *Messenger* Court noted that it was customary in the oilfield industry for the employer to pay the driller to drive and to transport his crew.[10] The employer also provided the employee with a company vehicle

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[4] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[5] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[6] Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer.

[7] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[8] *Mendoza v. DCS Sanitation*, 37 Kan. App.2d 346, 152 P.3d 1270 (2007).

[9] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

[10] *Id.* at 440.

which he was allowed to take home and drive to the work site each day, thus furthering the employer's interests.[11] It was also important that the employee had no fixed work site.[12]

Two other cases that discuss this travel exception are *Kindel*[13] and *Foos.*[14] In *Kindel*, the claimant was "expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor."[15] But on the day in question, the claimant and his supervisor were on their way home when they stopped at a local club where they became inebriated. After leaving the club, the two were involved in an automobile accident. The *Kindel* Court was asked whether an employee's personal or non-business-related activity would be considered a deviation from the employer's work. Absent the deviation to the club, the claimant's trip home with his supervisor was considered compensable under the travel exception.

Similarly, in *Foos*, the claimant was hired as a pest control technician and was provided a vehicle to use on his route. His job required him to regularly drive from his home to each of his accounts along his route and back again. On the day of his accident, claimant was on his way home to Solomon, Kansas after taking a deviation from his normal route to participate in a golfing contest. The Kansas Supreme Court concluded that claimant had returned to his employment and was engaged in traveling on a public highway, an activity contemplated by his employer, and thus, his accidental injury arose out of and in the course of his employment.[16]

Taken together, these cases illustrate the principle advanced by the claimant. Travel is inherent in claimant's job as a supervisor for respondent. And he was on his way to work on the day of his accident in a truck provided by respondent and because he was performing a task contemplated by respondent, his injury is, according to claimant, compensable.

The ALJ concluded the following:

> This is a close question, but the court concludes that claimant has failed to sustain his burden of proof that his accidental injuries arose out of and in the course of his employment. While he had been hired as a driller and travel was intrinsic to his

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[11] *Id.* at 439.

[12] *Id.*

[13] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[14] *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004).

[15] *Kindel*, 258 Kan. at 277.

[16] *Foos*, 277 Kan at 692.

> employment ***as a driller***, at the time of his accident [c]laimant was working at a fixed site and was simply commuting home from work at the end of the work day, just like any other commuter. There was no benefit to the employer from the commute, demonstrated by the evidence. The risk of a car accident was no greater for [c]laimant than for any other member of the commuting public. This claim is barred by the "going and coming" rule of **K.S.A. 44-508(f)**.[17]

A majority of this Board has concluded that the ALJ's Order should be reversed. There is no doubt that travel was inherent in claimant's job and that his job site varied. On this particular occasion, his job assignment required him to go to the brick and mortar location rather than a remote location. Although this location was respondent's home office it was not claimant's customary work site. Whether his travel involved a remote location or a more local destination, he was nonetheless required to travel and was compensated for that travel. Accordingly, a majority of the Board finds that this claim is compensable. The ALJ's preliminary hearing Order is therefore reversed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[18] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated October 23, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of December 2007.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[17] ALJ Order (Oct. 23, 2007) at 5.

[18] K.S.A. 44-534a.